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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

No. 23.

NEROY CARTER,
Appellant,

v.

ATLANTA & SAINT ANDREWS BAY RAILWAY COMPANY,
Appellee.

SUPPLEMENTAL BRIEF

On Behalf of Appellee, Atlanta & Saint Andrews Bay Railway Company.

JAMES N. FRAZER,
B. D. MURPHY,
1130 Citizens and Southern Bank Bldg.,
Atlanta, Georgia,
Attorneys for Appellee.

ALTO V. LEE,
Dothan, Alabama,
NEWELL EDENFIELD,
POWELL, GOLDSTEIN, FRAZER & MURPHY,
Atlanta, Georgia,
Of Counsel.

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PRELIMINARY STATEMENT.

Our original brief was filed without having received a brief from opposing counsel and without any knowledge of what contentions would be urged by plaintiff on final argument. At the time the original brief was filed we expressly requested leave to file a supplemental brief at a later time. The present brief is submitted pursuant to that request.

ARGUMENT.

I. The Issue as to the Safety Appliance Act.

At the outset let us define the scope of this issue. Counsel for plaintiff have sought to inject into this case a contention that L. & N. Car 20042 violated the Safety Appliance Act not only by having a defective coupler but also by having a defective automatic brake. Such contention is not only unsound but in fact is not even properly before this Court. In the first place, the Safety Appliance Act does not require automatic brakes on each individual car, such brakes being required only when several cars are coupled together to form a train (45 U. S. C. A. §§ 9, 11). During the period here involved L. & N. Car 20042 was never so coupled. In the second place, no allegation of a defective brake is contained in plaintiff's petition, and of course, having failed to make this point before the trial court, it is too late for plaintiff to raise it here.

We go then to the question of the defective coupling. We believe our original brief sufficiently demonstrates that in this respect the Safety Appliance Act was not violated in this case. Not only was there no direct evidence showing that the coupler was defective, but the circumstantial evidence actually adduced points at least equally to the hypothesis that plaintiff himself had set it wrong. However, as we pointed out in our brief on certiorari and again on oral argument, it is not necessary for the Court to decide this question in this case; for in this case even if the appliance was defective its failure was not the proximate cause of plaintiff's injury. On the contrary the cause, and the sole cause, of plaintiff's fall was the second movement of the train in connection with which plaintiff says the engine was moving too fast. This issue was submitted to the jury, who have found for the railroad.

All that remains, therefore, is to discuss the case of **L. & N. v. Layton,**[1] which is most strongly relied on by the plaintiff. In the first place, the **Layton** case is not in point here for the simple reason that it did not involve the question of proximate cause at all. The real point involved in the Layton case was whether the provision of the Safety Appliance Act relating to automatic couplers was intended only for the benefit of employees injured when between the cars for the purpose of coupling or uncoupling them. The whole pressure of the case was upon that point. The opinion holds this contention of the railway company was not sound, and that is all it holds.

Furthermore, the **Layton** case presents an altogether different set of facts, and while it bears some superficial resemblance to the present case in a factual sense, from a causal point of view it is altogether different. In the **Layton** case the failure of a coupling set in motion a string of cars on which plaintiff was riding. The cars thus set in motion continued to roll without stopping until they struck other cars, throwing plaintiff to the ground. Between the failure of the coupling and the resulting injury there was neither pause nor intervening movement. The movement in the course of which the injury occurred was the very same movement which the defective coupling started. There was no second movement of the engine, as in the present case, nor were the rolling cars ever brought to rest before the injury occurred. Any resemblance, therefore, between the present case and the **Layton** case is purely superficial. The most that can be said in comparing the two cases is that in each case the failure of a coupling set a car in motion and in each case an injury occurred in a second collision which followed. But the vital point of distinction lies in the answer to the question, **what caused the second collision?** In the **Layton**

1 243 U. S. 617, 37 S. Ct. 455, 61 L. Ed. 931.

case the second collision (and therefore the injury) was caused by the defective coupling. This is patently true because the defective coupling started the very movement in the course of which the second collision and the injury occurred. In the present case, on the other hand, all the failure of the coupling did was start the car to roll. But it was not in the course of this movement that the injury and second collision ensued. In fact, in the present case the rolling car was thereafter brought to rest and it was only a new factor in the form of the moving engine which made the second collision and the injury possible. It follows, therefore, that since in the present case the movement of the engine was the producing cause, and since the engine's movement was caused not by the failure of the coupling but by plaintiff's own signal, the defective coupling had nothing to do with either the second collision or the plaintiff's fall. These facts clearly differentiate the **Layton** case.

II. The Charge of the Court.

In his petition for certiorari plaintiff also makes several complaints based on the charge of the court on the question of proximate cause. Frankly, we find these assignments quite difficult to argue for the simple reason that they raise no issues requiring a reply. The main complaint of the plaintiff seems to be that in the course of the charge the court referred to the question of proximate cause on six separate occasions. But so long as his charge was fair—so long as it gave no advantage to either party—we can see no basis for objection to it on this ground. If the charge was impartial and if the Judge considered this the vital element of the case, we fail to see how the plaintiff could be harmed had he mentioned it a dozen times. Furthermore, we think that in the first part of this brief we have demonstrated that the question of proximate

cause was the vital issue in the case, and if this is true the Court was of course justified in emphasizing this fact. Plaintiff himself admits that one of these references was given upon his own request and we think that the Judge's further explanation at this point was proper and that it represented a correct statement of the law.

Moreover, at least two of the excerpts of which the plaintiff complains were given not on the question of proximate cause, but on the question of damages, and were absolutely necessary if the jury was to make any intelligent determination of the case. The plaintiff has merely torn these excerpts from their context and made it appear they were given on the question of proximate cause when, if taken in their proper place, they clearly indicate that the Judge was charging the measure of damages in the event the jury found for plaintiff. Thus at page 17 of plaintiff's petition he complains of the following portion of the charge:

> "If you find for the plaintiff, and find that he was not negligent in any manner, and that his injury was entirely the proximate result of the negligence of the engineer or some of the other employees at that time, then you would award such measure of damages as in your judgment would reasonably compensate him for the injury that he had suffered."

Thereafter the court immediately charged that if on the contrary the jury found that both parties were negligent then they should weigh one against the other and do what they thought was right in the way of damages, according to the evidence and rules of law previously given in charge. At still another place he charged that plaintiff could not recover at all if he were wholly to blame.

These charges of course relate not to proximate cause but to damages. If the jury was to reach any intelligent

verdict in this case it was necessary that they be charged a different measure of damages for each of three different situations, any one of which the jury might have found to exist, viz.: (1) the measure of damages if the plaintiff were guilty of no negligence and the defendant were entirely to blame; (2) the measure of damages if both parties were partly to blame; and (3) the measure of damages if the negligence of plaintiff were the sole proximate cause.

It is clear from reading the charge as a whole that what the court intended was to differentiate these situations and that the Judge properly stated the rule and that the jury could not possibly have been misled.

Finally, if there were any doubt as to the propriety of the Judge's charge on the issue of proximate cause, such doubt was clearly resolved by the plaintiff's oral objection at the time the charge was given and the Judge's corrective remarks made to the jury in response thereto. It is difficult to overestimate the effect of these remarks on the jury. If plaintiff's counsel himself had charged the jury he could have done no better. Here the plaintiff's counsel first announced to the court what his objections to the charge were and told the court what he wanted charged, whereupon the court said, "I will modify it to that extent", and then proceeded to further charge the jury in almost identical language the very thing the plaintiff had requested. Of course the plaintiff's final complaint that in making these corrective remarks the court used the words "wholly responsible" instead of the words "solely responsible" is pure quibbling and could have had no possible effect upon the verdict.

The above, we believe, takes care of all contentions as to the Safety Appliance Act and the charge of the court. The remaining issues raised by the plaintiff concerning the company rule, the speed of the train, and the alleged

delay of the engineer in applying his brakes have been submitted to a jury and found for the railroad. There is ample evidence to support their verdict and we respectfully submit that the judgment should be affirmed.

Respectfully submitted,

JAMES N. FRAZER,
B. D. MURPHY,
1130 Citizens & Southern Bank Building,
Atlanta, Georgia,
Attorneys for Appellee.

ALTO V. LEE,
Dothan, Alabama,
NEWELL EDENFIELD,
POWELL, GOLDSTEIN, FRAZER & MURPHY,
Atlanta, Georgia,
Of Counsel.

I, James N. Frazer, of counsel for the appellee in this case, do hereby certify that I have mailed copies of the above and foregoing brief to Hon. J. Kirkman Jackson and Hon. Erle Pettus, 818 Massey Building, Birmingham 3, Alabama, on this 27th day of October, 1949, both attorneys of record for the appellant.

James N. Frazer.